IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 662 of 2001
with
CIVIL REVISION APPLICATION No 663 OF 2001

For Approval and Signature:

Hon'ble MR.JUSTICE A.K.TRIVEDI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

ASHRAFKHAN AZADKHAN PATHAN

Versus

MARIAMBIBI D/O KARIM MIYA RAHIM MIYA KADRI & OTHERS

Appearance:

1. Civil Revision Application No.662 of 2001
   MR MA KHARADI for Petitioner
   MR YM THAKKAR for Respondent No.1
2. Civil Revision Application No.663 of 2001
   MR MA KHARADI for Petitioner
   MR YM THAKKAR for Respondent No.1

CORAM : MR.JUSTICE A.K.TRIVEDI

Date of decision: 26/06/2001

COMMON ORAL JUDGEMENT

1. Rule. Learned advocate Mr.Y.M.Thakkar appearing on behalf of respondent No.1 in each of the matter waives service of rule.

2. The petitioner of the above stated matters have challenged the common order dated 20/4/2001 passed by District Judge, Panchmahal, District : Godhra in the proceedings of Civil Misc. Appeal Nos.167, 168 and 169 of 1999.

That vide impugned order, the Civil Misc. Appeal Nos.168 and 169 of 1999 are dismissed, while Civil Misc. Appeal No.167 of 1999 is partly allowed and the judgment and order of the trial Court to the extent of awarding civil imprisonment of one month to the appellant/present petitioner is set aside while rest of the judgment and order of the trial Court is confirmed.

3. That the respondent No.1 herein filed Regular Civil Suit No.84 of 1995 in the Court of Civil Judge (J.D.), Dahod, District : Godhra against the petitioner and respondent Nos.2-3 for declaration and injunction restraining the present petitioner/defendant from raising any construction or causing any obstruction in the passage of 4'9" in width situated on the southern side of her property. That application Exh.5 was also moved by the respondent/plaintiff for a temporary injunction to restrain the petitioner/defendant from raising any construction on the disputed land used as a passage admeasuring about 4'9" in width situated on the southern side of the property, pending the final hearing and disposal of the suit. The separate application for appointment of the Court Commissioner was also made requesting the direction to the Commissioner to inspect

the suit site and to prepare the Map along with the note of inspection and to produce the same on the record of Court.

4. It appears from the record that the present petitioner was served with the notice by the Court Commissioner for inspection of the suit site and in response to the same, the petitioner requested the Court Commissioner and the original plaintiff to postpone the inspection on the stipulated date as there were religious rites to be performed during the said days. It appears from the record that the petitioner/defendant having postponed the inspection of the suit site by the Court Commissioner, intended to make alteration and raised part of the construction on the disputed passage. It further appears from the record that the order of status-quo

initially granted by the trial Court below Exh.5 was for a limited period and on a subsequent date; on account of inadvertence on the part of the respondent/plaintiff, the order of status quo could not be extended and taking advantage of the same, petitioner/defendant carried out the construction on the disputed passage. Therefore, the original plaintiff moved an application Exh.28 with a prayer for direction to the defendant to demolish the structure raised on the disputed site and to keep the passage open to sky and also moved an application Exh.30 under Rule-2(A), Order-39 of the Civil Procedure Code to take appropriate action against the defendant for committing breach of injunction.

5. That vide order dated 30/9/1999 after hearing Exh.5, Exh.28 and Exh.30, the trial Court directed the petitioner/defendant to maintain the status-quo as per earlier order granted and further directed to remove the disputed construction carried out on the suit passage at his costs within a period of seven days from the date of the order and to keep the passage in dispute open to sky. The trial Court also held that the petitioner/defendant was guilty for committing the wilful breach of injunction order and directed the petitioner to undergo civil imprisonment for a period of one month and to appear for such imprisonment within seven days from the date of order.

6. The petitioner/defendant challenged the above stated orders passed below Exh.5, Exh.28 and Exh.30 by three separate Misc. Civil Appeals Nos.167, 168 and 169 of 1999 in the District Court, Panchmahal. That after hearing the parties; vide impugned orders, the learned District Judge dismissed the Misc. Civil Appeal Nos.168 and 169 of 1999 and partly allowed the Misc. Civil Appeal No.167 of 1999 as stated hereinabove. The petitioner has challenged the said order in the present Revision Applications.

As both the petitions are cognate, they are taken up for hearing together and are being disposed of by this common order.

7. Mr.M.A.Kharadi, learned advocate for the petitioners has vehemently urged that the trial Court has failed to appreciate the documentary evidence particularly the document produced vide Exh.57/1 which is a sale-deed in respect to purchase of the part of the property by the petitioner dated 21/3/1987. That in the said document vendor of the property has not granted any such right of passage on the southern side of the

property as claimed by the plaintiff by way of passage of 4'9" in width. Furthermore, it is submitted by Mr.M.A.Kharadi that the disputed construction, raised on the suit property, was raised by the owner of the property after taking necessary permission from the Local Authority, and at the time when no injunction order was in operation. The trial court as well as lower appellate Court have grossly erred by directing the petitioner/defendant to demolish the same and to keep the passage open to sky.

8. The submission urged at Bar on behalf of the petitioner cannot be accepted for more than one reason. It is pertinent to note that the property claimed by the original plaintiff consists of different parts of City Survey numbers which are transferred by different sale-deeds and except the sale-deed produced vide Exh.57/1 in all other sale-deeds, there is a mention of passage on the southern side of the property admeasuring 4'9" in width. Not only that but document executed by predecessor-in-title of the vender to the document produced at Exh.57/1 also contain a mention about the existence of such passage and thereby it cannot be said that the trial Court as well as lower Appellate Court have committed an error of fact while giving such findings. It is pertinent to note that right to passage as claimed by the plaintiff has to be ascertained by construing the documentary evidence as a whole and not by perusing the same in piecemeal. Under the circumstances, as there is a concurrent findings of the trial Court as well as lower Appellate Court, this Court while exercising the revisional power would be reluctant to interfere; by considering the said findings as perverse.

9. It is also pertinent to note that the order of status-quo granted initially below Exh.5 by the trial Court remained in force and it was not vacated by hearing the parties and technically the extension of the said order could not be made. Under such circumstances, the petitioner/defendant who was aware of such order should not have taken disadvantage of the same to raise the construction which would defeat the right of the plaintiff and make the litigation infructuous. The conduct of petitioner/defendant could not be approved because the petitioner/defdendant has made the Commissioner to postpone the inspection. Futhermore, the conduct of defendant is also blame worthy. Not only for using subterfuge but also for flouting the order of the Court as it appears from the judgment of lower Appellate Court that the petitioner/defendant continued the construction in the disputed premises despite the order

of status-quo. Thus, the conduct of petitioner/defendant disentitled him to claim any equitable consideration in his favour and as a result, no interference of revisional Court is warranted in either of the revisional proceedings when no jurisdictional error or illegal exercise of jurisdiction could be pointed out.

10. On the basis of forgoing discussions, both the revision applications fail and stand disposed of as rejected. Rule discharged.

On behalf of the petitioner request is made to postpone the implementation and operation of the above stated order as earlier the lower Appellate Court has postponed the operations of impugned orders till 25/6/2001 which is extended by this Court upto 26/6/2001, so as to enable the petitioner to approach the higher forum. In the facts and circumstances of the case, it would not be just and proper to grant any such relief and hence the request is rejected.

(A.K.TRIVEDI,J.)

(vrpanchal)*